FILED BY CLERK
SEP 22 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THOMAS SACK, Petitioner, v. HON. WALLACE R. HOGGATT, Judge of the Superior Court of the State of Arizona, in and for the County of Cochise, Respondent, and STATE OF ARIZONA, Real Party in Interest.	2 CA-SA 2011-0061 DEPARTMENT B DECISION ORDER

SPECIAL ACTION PROCEEDING

Cochise County Cause No. 201000268

JURISDICTION ACCEPTED; RELIEF DENIED

Malanga Law Office
By Rafael Malanga
Bisbee
Attorney for Petitioner

Edward G. Rheinheimer, Cochise County Attorney
By Brian M. McIntyre
Bisbee
Attorneys for Real Party in Interest

¶1 In this special action, petitioner Thomas Sack challenges the respondent judge's denial of his motion to disqualify the Cochise County Attorney's Office (CCAO) from criminal proceedings initiated against him. We are asked to decide whether the respondent erred in applying the guidelines enumerated in *State ex rel. Romley v. Superior Court*, 184 Ariz. 223, 908 P.2d 37 (1995), or in determining whether the CCAO should be disqualified based on a vicarious conflict of interest. Because Sack has no equally plain, speedy, and adequate remedy by appeal, we accept jurisdiction. Ariz. R. P. Spec. Actions 1(a); *see also* A.R.S. § 13-4033(A); *Romley*, 184 Ariz. at 225, 908 P.2d at 39. For the reasons stated below, however, we deny relief.

¶2 Sack was arrested and charged for several felony offenses, including transportation of marijuana for sale. Deputy Public Defender Daniel Akers was appointed to represent Sack and, during a settlement conference, had a privileged conversation with him that included discussion of the merits of Sack's case. While represented by Akers, Sack entered a plea agreement from which the state later withdrew. Akers then filed a notice stating Sack's case had been reassigned to a different public defender. Sack later retained his present counsel. Upon learning Akers had joined the CCAO after his representation of Sack had ended, Sack moved to disqualify the CCAO from prosecuting the charges against him.

¶3 After a hearing,[1] the respondent denied Sack's motion. He determined Akers was disqualified from prosecuting Sack based on ER 1.9, Ariz. R. Prof'l Conduct,

[1]Sack has not provided this court with a transcript of that hearing. We therefore presume it supports the respondent's ruling. *See State v. Wilson*, 179 Ariz. 17, 19 n.1,

Ariz. R. Sup. Ct. 42. He also determined ER 1.10 governed whether the CCAO should be disqualified based on Akers's conflict. The respondent described the CCAO's screening procedures in detail and found that neither Akers nor the CCAO had provided information to Sack about those procedures as required by ER 1.10(d). Relying on *Romley*, however, the respondent concluded that, even assuming the screening procedures were inadequate and CCAO had not communicated those procedures to Sack, the CCAO was not disqualified from prosecuting Sack, chiefly because Sack had not demonstrated any actual breach of attorney-client confidentiality had occurred.

¶4 In *Romley*, Division One of this court determined that ER 1.11, which governs conflicts of interest for former and current government officers and employees, had removed the previously existing requirement that a prosecutor's office be disqualified, based on imputed knowledge, "when a defendant's attorney changed employment and joined the prosecution." 184 Ariz. at 226, 908 P.2d at 40. The court nonetheless found that, because "an appearance of impropriety" remained "an integral part of any conflict-of-interest analysis," imputed knowledge could still serve as a basis for disqualifying a prosecutor's office. *Id.* at 226-27, 908 P.2d at 40-41. The court went on to identify guidelines for trial courts to examine in evaluating whether disqualification is required. *Id.* at 227-28, 908 P.2d at 41-42.

---

875 P.2d 1322, 1324 n.1 (App. 1993) ("It is defendant's responsibility to see that the record contains the material to which he takes exception, and the failure to provide relevant transcripts can result in the presumption that the missing material supports the action of the trial court.").

¶5 As noted above, the respondent concluded ER 1.10 governed any conflict in this matter. That rule, unlike ER 1.11, expressly provides for disqualification based on imputed knowledge, stating that lawyers "associated in a firm" generally are not permitted to "knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9." ER 1.10(a), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42. When such a conflict exists, absent waiver pursuant to ER 1.7, the firm may represent that client only if "the matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role," that lawyer "is timely screened from any participation in the matter and is apportioned no part of the fee therefrom," and "written notice is promptly given to any affected former client." ER 1.10(d), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42. Sack asserts that, because the screening measures employed by CCAO were inadequate and he received no notification of them, disqualification is mandatory under ER 1.10. Thus, he reasons, the *Romley* guidelines do not apply, and the respondent erred in considering them.[2] We review the respondent's decision for an abuse of discretion. *See State v. Williams*, 136 Ariz. 52, 57, 664 P.2d 202, 207 (1983); *see also* Ariz. R. P. Spec. Actions 3(c) (special action relief appropriate when respondent's "determination was arbitrary and capricious or an abuse of discretion"). However, to the extent his decision rests upon interpretation of our ethical rules, our review is de novo. *Godoy v. Hantman*, 205 Ariz. 104, ¶ 5, 67 P.3d 700, 702 (2003).

[2]Sack also asserts *Romley* does not apply because ER 1.10(d) was added in 2003, after *Romley* was decided.

¶6 We need not address whether an analysis based on *Romley* is appropriate under ER 1.10 because that rule does not apply here; whether the CCAO must be disqualified is instead governed by ER 1.11. By its plain language, ER 1.10 applies only to lawyers associated with a "firm." *See Potter v. Vanderpool*, 225 Ariz. 495, ¶ 8, 240 P.3d 1257, 1260 (App. 2010) (plain language best indicator of supreme court's intent in promulgating rule). ER 1.0(c) defines a "[f]irm" or "law firm" as "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." It further provides that "[w]hether government lawyers should be treated as a firm depends on the particular Rule involved and the specific facts of the situation." *Id.*

¶7 Nothing in the plain language of ER 1.10 suggests that it would apply to a county prosecutor's office. In contrast, ER 1.11(c) refers to "a lawyer serving as a public officer or employee," which clearly encompasses a county attorney's office. The respondent determined ER 1.11(c) did not apply because Akers "was not in private practice nor was he a nongovernmental employee at any relevant time." But comment seven to ER 1.10 states that, pursuant to ER 1.11(c), "where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer." That comment makes clear that, although ER 1.11(c) does not specifically address the situation where a lawyer has moved from one governmental agency to another, the relevant factor in determining

whether ER 1.11(c) applies is whether the lawyer's current employer is a government agency, not the nature of his or her former employer.[3] *See also* ER 1.11 cmt. 3, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42 ("Because of the special problems raised by imputation within a government agency, paragraph (c)(1) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.").

¶8 As noted in *Romley*, ER 1.11 does not require disqualification based on a vicarious conflict of interest. 184 Ariz. at 226, 908 P.2d at 40; ER 1.11(c). Whether a vicarious conflict of interest requires disqualification is instead based on the guidelines enumerated in that decision. Accordingly, because ER 1.11 governs here, the respondent did not err in considering those guidelines.[4]

¶9 Relief denied.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

Presiding Judge Vásquez and Judge Espinosa concurring.

[3]We need not reach the question whether a public defender's office should be considered a governmental agency or a private firm, based on its unique position of representing private citizens, not the government.

[4]Sack does not suggest that, if *Romley* applies, the respondent erred in determining the CCAO need not be disqualified. We therefore do not address that question.